LIBRARY
SUPREME COURT, U. S.
FILED
APR 5 1971
E. ROBERT SEAVER, CLERK

IN THE Supreme Court of the United States

October Term 1970

No. 1543

PAUL "J" NIX, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

WILLIAM G. SMITH,
MICHAEL E. SOMERS,
DANIEL KALLEN,
DON ROSS BAY,
Attorneys for Petitioner.

MARGOLIS, McTERNAN, SMITH,
SCOPE & HERRING,
3325 Wilshire Boulevard,
Los Angeles, Calif. 90005,

SOMERS & KALLEN,
2512 Wilshire Boulevard,
Santa Monica, Calif. 90403,
Of Counsel.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statutory and Regulatory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	4
Introduction	4
Recent Decisions of This Court Cast Doubt Upon the Validity of Regulation 1625.2 and Thus Indicate That the Ninth Circuit's Decision in This Case Implicitly Holding the Regulation Valid and Authorized Is an Important Question of Federal Law Which Has Not Been but Should Be Decided by This Court	4
Conclusion	29
Opinion of the United States Court of Appeals for the Ninth Circuit	App. p. 1

TABLE OF AUTHORITIES CITED

Cases	Page
Boyd v. United States, 269 F. 2d 607	13, 18, 23
Breen v. Selective Service Local Board No. 16, 396 U.S. 260	5, 9, 19, 22, 24
Davis v. United States, 374 F. 2d 1	23
Dugiale v. United States, 389 F. 2d 482	17
Ehlert v. United States, 422 F. 2d 332, cert. granted 397 U.S. 1074	2, 12, 13, 23, 29
Gutknecht v. United States, 396 U.S. 295	4, 5, 6, 8, 9, 11, 12, 16, 19, 20, 22, 24, 25, 28
Keene v. United States, 266 F. 2d 378	13, 23
Kent v. Dulles, 357 U.S. 116	12
Lockhart v. United States, 420 F. 2d 1145, 2 SSLR 3436	26
Mulloy v. United States, 398 U.S. 410	8, 13, 15
Oestereich v. Selective Service Local Board No. 11, 393 U.S. 233, 1 SSLR 3215	5, 11, 19, 24
Olsen v. United States, 423 F. 2d 929, 2 SSLR 3639	20, 22
Paszel v. Laird, 426 F. 2d 1169	17
Quaid v. United States, 386 F. 2d 29	20, 22
Sherbert v. Verner, 374 U.S. 398	27
Toussie v. United States, 397 U.S. 112	5, 19, 20, 22, 24
United States v. Beaver, 309 F. 2d 273	13, 23
United States v. Cassarino, 314 F. Supp. 813	17
United States v. Clark, 105 F. Supp. 613	9, 10, 21, 22, 23
United States v. Crawford, 119 F. Supp. 729	9, 10, 21, 22, 23

Page

United States v. Eisdorfer, 299 F. Supp. 975 24

United States v. Freeman, 388 F. 2d 246 25

United States v. Gearey, 368 F. 2d 144 .....
.....10, 12, 13, 16, 17, 23, 29

United States v. Jennison, 402 F. 2d 51, SSLR 3211, cert. den., 394 U.S. 912, reh. den. 394 U.S. 955 23

United States v. Kroll, 400 F. 2d 923 .....13, 23

United States v. Palmer, 223 F. 2d 893 .....12, 13

United States v. Robel, 389 U.S. 258 25

United States v. Schoebel, 201 F. 2d 31 ..22, 23, 24, 28

United States v. Taylor, 351 F. 2d 228 23

United States v. Underwood, 151 F. Supp. 874 ....
.....10, 18, 21, 22, 23

United States v. Walker, 403 F. Supp. 115 13

United States v. Walker, 424 F. 2d 1069 .....13, 23

Miscellaneous

Executive Order No. 10594 6

House Report No. 267, May 18, 1967 14

Rules

Federal Rules of Criminal Procedure, Rule 21(b) .. 29

Statutes

Code of Federal Regulations, Title 32, Sec. 1611. 7 5

Code of Federal Regulations, Title 32, Sec. 1611. 7(c) 19

Code of Federal Regulations, Title 32, Sec. 1622. 15 14

Page

Code of Federal Regulations, Title 32, Sec. 1625.2 .....2, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 18 .....20, 21, 22, 23, 24, 28

Code of Federal Regulations, Title 32, Sec. 1631.7 24

Code of Federal Regulations, Title 32, Sec. 1631.7(b) 14

Code of Federal Regulations, Title 32, Sec. 1631.8 20

Code of Federal Regulations, Title 32, Sec. 1642 .....4, 24

Military Selective Service Act of 1967, Sec. 1(c) .. 28

Military Selective Service Act of 1967, Sec. 3 19

Military Selective Service Act of 1967, Sec. 6(c)(2)(D) 20, 21

Military Selective Service Act of 1967, Sec. 6(h)(1) 19

Military Selective Service Act of 1967, Sec. 6(j) 2, 7, 8, 9, 10, 14, 19, 20, 21, 22, 23

Military Selective Service Act of 1967, Sec. 10 .....7, 9, 21

Military Selective Service Act of 1967, Sec. 10(b)(1) 2, 6, 7, 12, 20, 21

Military Selective Service Act of 1967, Sec. 10(b)(3) 10

Military Selective Service Act of 1967, Sec. 12(a) 3

United States Code, Title 18, Sec. 3231 3

United States Code, Title 28, Sec. 1254(1) 1

United States Code, Title 50, App., Sec. 456(j) ..4, 20

Page

United States Code, Title 50, App., Sec. 462(a) 3

United States Code, Title 50, App., Sec. 453 19

United States Constitution, First Amendment 8

Textbooks

54 California Law Review (1966), p. 443 27

54 California Law Review (1966), p. 2123 26

81 Harvard Law Review (1968), p. 1439 27

Selective Service Local Regulations, Practical Manual, Par. 1048.1, note 10 26

United States Code, Congressional and Administrative News (1967), p. 1334 14

39 Washington Law Review (1964), p. 4 27

40 Washington Law Review (1965), p. 10 27

Ziegler, Selective Service Meets Massive Resistance, New York Magazine, June 29, 1970, p. 28 14

IN THE

Supreme Court of the United States

October Term 1970
No. .....

PAUL "J" NIX, *Petitioner,*

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioner, Paul "J" Nix, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on February 3, 1971.

Opinions Below.

The District Court did not enter an opinion in this case. The opinion of the Court of Appeals is not yet reported. It is set forth in the Appendix to this Petition.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 3, 1971. Petitioner timely applied to Mr. Justice Douglas for an extension of time in which to file the Petition for Writ of Certiorari, which extension was granted to and including April 4, 1971. The jurisdiction of this Court is conferred by 28 U.S.C. § 1254 (1).

Questions Presented.

Is 32 C.F.R. § 1625.2 which denies petitioner's claim to be heard by his local board authorized by § 10(b)(1) of the Military Selective Service Act of 1967 and consistent with that section and § 6(j) of the Act?

Statutory and Regulatory Provisions Involved.

50 U.S.C. App., Section 456(j):

> "(j) Conscientious Objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."

Selective Service Regulations, 32 C.F.R. Section 1625.2:

> "The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds that there has been a change in the registrant's status resulting from circumstances over whic' the registrant had no control."

Statement of the Case.

The petitioner, Paul "J." Nix, was issued an induction order by Selective Service Board No. 116 of Los Angeles County, California, on February 28, 1969. On March 21, 1969, the defendant wrote to the board and requested a Selective Service System Form 150 (Special Form for Conscientious Objector). This Form

was subsequently mailed to the defendant and the defendant completed it and returned it to the board on March 24, 1969. On April 4, 1969, the board met and granted the defendant a "courtesy interview" under the provisions of Local Board Memorandum 41 (in force at the time). During the interview, the local board members asked the defendant a variety of questions in an attempt to ascertain the type of belief he claimed to hold and his sincerity in holding such beliefs. In the interview summary prepared by the local board it is noted that Petitioner had been a conscientious objector for some time prior to the date on which he made a claim for such classification. The Local Board determined that Petitioner's beliefs had not changed due to circumstances beyond his control, refused to consider his request for consideration for conscientious objector classification and re-ordered Petitioner to report for induction.

On June 30, 1969, the Petitioner reported to the Los Angeles Armed Forces Entrance and Examining Station as ordered by his board but refused to submit to induction as ordered by Army personnel.

Petitioner was indicted in the District Court of the Central District of California for refusing to submit to induction in violation of Section 12(a) of the Military Selective Service Act of 1967, 50 U.S.C. Appendix § 462(a). (Jurisdiction of the district court was pursuant to 18 U.S.C. § 3231.) Petitioner pleaded not guilty and he was tried by the Honorable Judge Irving Hill, sitting alone, and was found guilty as charged and sentenced to custody of the Attorney General for three years on the condition that he be confined in a jail for six months and thereafter be required to perform twenty-four months of alternate civilian service.

REASONS FOR GRANTING THE WRIT.

Introduction.

Certiorari should be granted in this case since it raises a question which affects a substantial number of cases currently in various stages of litigation. This case deals with an interpretation of the statutory rights of registrants who are seeking and might seek to acquire conscientious objector status and whose claims are denied consideration by an unwarranted administrative regulation which denies consideration of a claim not presented within the timeliness requirement of that regulation.

Recent Decisions of This Court Cast Doubt Upon the Validity of Regulation 1625.2 and Thus Indicate That the Ninth Circuit's Decision in This Case Implicitly Holding the Regulation Valid and Authorized Is an Important Question of Federal Law Which Has Not Been but Should Be Decided by This Court.

This Court, during its October 1969 Term, made it abundantly clear that Selective Service Regulations are not sacrosanct, and that they cannot create obligations which are not within the statutory scheme of the Military Selective Service Act of 1967. This Court held in a criminal case, and the week thereafter in a pre-induction civil case, that when a regulatory provision is unauthorized by, and/or in conflict with the statute under which it was promulgated, it is invalid.

Thus in *Gutknecht v. United States,* 396 U.S. 295 (1970) this Court invalidated Selective Service Regulations relating to "delinquency". (32 C.F.R. pt. 1642.) The Court found the delinquency regulations to be

unauthorized by statute and in conflict therewith. Then, in *Breen v. Selective Service Local Board No. 16*, 396 U.S. 260 (1970) this Court extended *Gutknecht's* invalidation of the delinquency regulations to a situation involving preinduction review.[1] And finally, in *Toussie v. United States*, 397 U.S. 112 (1970) this Court refused to apply Selective Service Regulation 32 C.F.R. § 1611.7, imposing upon registrants a continuing duty to register, in a situation involving application of the statute of limitations. The Government argued that the statute of limitations only began to run when a registrant's continuing duty to register (as contained in the regulation) was at an end; *i.e.*, at the age of 26. But this Court rejected the Government's contention and held that the absence of a provision in the *statute* making the failure to register a continuing offense, necessitated a finding that it was not a continuing offense for that purpose, and therefore, that the statute of limitations began to run after the registrant's intial failure to register, as defined by the statute, *i.e.*, six days after attainment of the age of 18.

The above cases demonstrate the manner in which conflicts between statute and regulation are to be resolved—the statute (by its clear language or "statutory scheme") takes precedence over the conflicting regulation. In a similar manner, Selective Service Regulation 32 C.F.R. § 1625.2 is invalid because it is

---

[1] *Gutknecht* and *Breen* thus concluded the process of invalidating the delinquency regulations, which had been begun in *Oestereich v. Selective Service Local Board No. 11*, 393 U.S. 233, 1 SSLR 3215 (1968), wherein the Court for the first time upheld the superiority of a statutorily-conferred draft status over a conflicting regulatory provision which operated to deprive the registrant of that statutory status.

both unauthorized by, and in conflict with the selective service statute.

Regulation 1625.2 as relevant herein, provides as follows:

> . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in registrant's status resulting from circumstances over which the registrant had no control.

Regulation 1625.2 was adopted in its current form, by the President in Executive Order 10594, on January 31, 1955. According to the official annotation of 1625.2, it is authorized by § 10(b)(1) of the Act, which, in both its present form, and 1955 form, provides that:

> "the President is authorized—(1) to prescribe the necessary rules and regulations to carry out the provision of this title."

In *Gutknecht*, the Government had also attempted to argue that the regulations involved (the delinquency regulations) were authorized by § 10 (b) (1) of the Act. But this Court rejected that contention *per force*:

> Section 10, however, relates neither to selection (§ 5) nor to deferments and *exemptions* (§ 6), but simply to the *administration* of the Act as delegated to the President . . .
>
> * * *

> . . . there is nothing to indicate that Congress authorized the Selective Service System to reclassify exempt or deferred registrants for punitive purposes and to provide for accelerated induction of delinquents. Rather, the Congress reaffirmed its intention under § 12, to punish delinquents through the criminal law.

396 U.S. at 301-2.

Similarly, § 10(b)(1), dealing with the *administration* of the Act, cannot be said to relate to the *exemption* for conscientious objectors provided for in § 6(j) of the Act. Nor is there anything to indicate that Congress authorized the Selective Service System in Regulation 1625.2 to impose a "change circumstances" requirement upon a conscientious objector applicant whose claim is made after the mailing of an induction order; rather in § 6(j) "Congress reaffirmed its intention" that:

> *nothing* contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States, who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form.

Thus, by the terms of the Act itself, a registrant who is a conscientious objector is not to be subjected to military service, notwithstanding any other provisions of the Act—and this would include § 10 of the Act, giving the President general powers of administration over the Selective Service System.

Part of the basis of the decision in *Gutknecht* was the effect of the regulation. The Court viewed dimly the attempt, in the delinquency regulations, to delegate powers that might be used to infringe individual liberty:

> Where the liberties of the citizen are involved, we said [in *Kent v. Dulles,* 357 U.S. 116, 128] that 'we will construe narrowly all delegated powers that curtail or dilute them.'

When draft boards are allowed to dispose of conscientious objector claims without considering them on their merits as envisioned in the statute (and thus denying the conscientious objector classification to many registrants who are admittedly conscientious objectors within the purview of § 6(j)), by making the discretionary, nonreviewable (either judicially or administratively) determination that reopening is improper, on the basis of 1625.2,[2] registrants may easily be deprived of their liberty—and as importantly, their cherished right to the free exercise of their religious beliefs, protected in unqualified terms in § 6(j) of the Act (and arguably, in the First Amendment of the Constitution)—without due process of law. Hence the

---

[2]See the recent case of *Mulloy v. United States,* 398 U.S. 410 (1970) for an analysis of the reopening process. In that case, this Court held that a local board had abused its discretion by refusing to reopen the classification of a registrant who had presented a *prima facie* claim for reopening (and reclassification). The Court noted:

* * *

> Because of the narrowly limited scope of judicial review available to a registrant, the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System. Where a *prima facie* case for reclassification has been made, a Board cannot deprive the registrant of such review by simply refusing to reopen his file. 398 U.S. at 414, 416; [footnotes omitted].

attempted delegation of powers in 1625.2 must be viewed suspiciously, in accordance with the mandate of this Court in *Gutknecht* and *Breen*.

Even if one were to concede the possibility that § 10 of the Act was so broad as to provide a sufficient authorization for Regulation 1625.2, one would immediately be met with another problem: the Regulation, *as applied to conscientious objectors* such as Petitioner is in conflict with § 6(j) of the Act, as quoted above. The statutory command in § 6(j) is quite clear. *Nothing* in the Act is to be construed so as to require a conscientious objector to be made subject to combatant training and service. Yet 1625.2 may act to deprive those registrants whose claims of conscientious objection are raised "late," of the recognition which § 6(j) intended to have.

The argument is relatively simple: Section 6(j) provides for an unqualified, absolute right to exemption for conscientious objectors. Insofar as this non-statutory regulation (1625.2) would act to limit the unqualified statutory right, when applied to conscientious objectors who first claim their exemption after the issuance of an induction order, the regulation may not be applied lawfully.

The above argument was accepted by the first courts to hear it. *United States v. Clark*, 105 F. Supp. 613 (W.D. Pa. 1952);[3] *United States v. Crawford*,

---

[3]In *Clark*, the local board, by labelling its unfavorable action on Clark's claim as a refusal to reopen, effectively denied him his statutory rights of appeal, including a Justice Department investigation. The court held that this restriction on Clark's statutory appeal rights, through the application of the Selective Service Regulations limiting appeal rights to cases in which there has been a reopening (and reclassification) was unlawful.

119 F. Supp. 729 (N.D. Calif. 1954);[4] and *United States v. Underwood,* 151 F. Supp. 874 (E.D. Pa. 1954) all protected the statutory rights of conscientious objectors[5] against attempted infringement by the exercise of nonstatutory regulations.

Aside from its conflict with § 6(j) of the Act, regulation 1625.2 conflicts as well with the Congressional policy affording the maximum in procedural safeguards to conscientious objector claimants:

> The long history of exempting conscientious objectors coupled with specific statutory right of appeal, indicate to us a strong Congressional policy to provide meticulous procedural protections to applicants who claim to be conscientious objectors, and indeed to grant deferments in appropriate cases.
>
> *United States v. Gearey,* 368 F. 2d 144, 150 (2d Cir. 1966).

---

[4]In *Crawford* the situation was similar to that in *Clark,* which was favorably cited by the court, as it held:

> ". . . the sole legal question before this court is whether an executive regulation may circumvent the clear language of the statute. To pose the question is to answer it. . . . While Regulation 1625.2 is not invalid on its face, it can have no applicability to a claim of conscientious objection *whenever made,* so as to deprive the objector of a hearing at which he may prove his good faith."

Id. at 730. Emphasis supplied.

[5]Until the amendments to § 6(j) worked by the Military Selective Service Act of 1967, conscientious objectors were afforded three such rights: (1) exemption; (2) appeal of unfavorable local board action; and (3) a Department of Justice investigation and Hearing (upon a tentative, unfavorable decision by the appeals board). Note that implicit in (2) above, was an additional right to "local board action" *i.e.,* a *hearing* of the claim on its merits, *prior* to any appeals. This implicit statutory right was incorporated in the regulations.

The 1967 amendments to § 6(j) eliminated the Department of Justice proceedings, and the reference to appeal rights (however such a right is also included in § 10(b)(3) of the Act.) The right to exemption from military service still remains in § 6(j), however.

Notwithstanding the above policy, pursuant to the application of 1625.2, conscientious objector claimants such as Petitioner here who fail to comply with the regulation's timing requirement (*i.e.*, claiming objector status prior to the mailing of an induction order)—a mere *procedural* defalcation—find that they must satisfy an additional substantive requirement for achieving entitlement to conscientious objector status (*i.e.*, demonstrating a change in circumstances beyond their control).

Another Supreme Court case, cited with approval in *Gutknecht, Oestereich v. Selective Service Local Board No. 11*, 393 U.S. 233 (1968), is also relevant here. In that case a registrant was deprived of a statutory exemption as a divinity student by use of the selective service regulations on delinquency. In a foretelling of what was later to come in *Gutknecht*, this Court denied the lawfulness of the use of the delinquency regulations:

> There is no suggestion in the legislative history that, when Congress has granted an exemption and a registrant meets *its* terms and conditions, a Board can nonetheless withhold it from him for activities and *conduct not material to the grant* or withdrawal *of the exemption.*
>
> 393 U.S. at 237 (emphasis supplied.)

A registrant's compliance or non-compliance with a procedural regulation such as 1625.2, is conduct which is not material to the merits of a conscientious objector claim; such conduct is in no wise indicative of the underlying merits of the registrant's claim for exemption as the statute and judicial gloss require: sincerity, *Welsh*-type "religiosity" and opposition to participation in war in any form.

Even if § 10(b)(1) of the Military Selective Service Act might be sufficiently specific to provide authorization for a regulation dealing with exemptions (rather than administration of the act), and even if regulation 1625.2 were not in conflict with the enabling act—even *if* all that were true, 1625.2 would still be invalid because it fails to meet the standard of necessity set out in § 10(b)(1).[6] Regulation 1625.2 is not only unnecessary, but unreasonable as well.

Most of the decisions dealing with 1625.2 have dealt with the alleged "reasonableness" of the regulation (as if "reasonableness" were equivalent to "necessity"). It might, therefore, be useful to evaluate the underlying reasons sought to justify the requirements of the regulation. It must be kept in mind, however, that even the most valid of reasons underlying a regulation would still not be enough to warrant a conclusion that the regulation is lawfully authorized, in the absence of such authorization.[7]

Under the guise of reasonableness it has been alleged that rules are needed to insure the "orderly functioning" of the Selective Service System, and that 1625.2 is a rule reasonably adapted to that end;[8]

---

[6]Section 10(b)(1) of the Act authorizes the President to "prescribe the *necessary* rules and regulations to carry out the provisions of this title." Emphasis supplied.

[7]See *Gutknecht, supra,* where Petitioner conceded that the delinquency regulations served a "reasonable purpose," but was still able to argue successfully that *notwithstanding their reasonableness, insofar as they restricted a statutory right, they were unauthorized and had to fall. See, e.g.,* Brief for Petitioner, at 26-27. The lesson from *Gutknecht* is that even "reasonable" regulations may frustrate Congressional will, and therefore cannot be allowed to stand. *Cf. Kent v. Dulles,* 357 U.S. 116 (1958).

[8]*See, e.g., Gearey* and *Ehlert. See also United States v. Palmer,* 223 F. 2d 893 (3rd Cir. 1955).

(This footnote is continued on the next page)

and in the absence of such a regulation, registrants will be able to force delays in their induction by raising frivolous conscientious objector claims.[9] However valid this "delay" argument may once have been, it is no longer valid in view of the profound amendment of pro-

---

See also Keene v. United States, 266 F. 2d 378 (10th Cir. 1959), relying on *Palmer,* and *United States v. Beaver,* 309 F. 2d 273 (4th Cir. 1962).

[9]The "delay" argument is raised in *Gearey, Ehlert,* and *Keene,* and also in *Boyd v. United States,* 269 F. 2d 607 (9th Cir. 1959), *United States v. Kroll,* 400 F. 2d 923 (3rd Cir. 1968) and *United States v. Walker,* 424 F. 2d 1069, (1st Cir. 1970), *aff'd. United States v. Walker,* 403 F. Supp. 115 (D. Mass. 1969); *pet. for cert. pending.*

The opinion in *Kroll,* as well as the district court opinion in *Walker,* both quote identical language from *Gearey* regarding the "reasonableness" of 1625.2 as a means of preventing delays:

> we can see no sound reason why a regulation may not require that claims for deferment should be advanced as soon as they have matured. If young men eligible for the draft are permitted endlessly to challenge their status and to claim review of adverse determinations, the effect on the Selective Service System would be chaotic for manpower quotas could rarely be met with any degree of certainty. This is especially true when the claim for deferment is based on a conscientious objection since a protracted process of Justice Department investigation and hearing is required . . . it is essential and proper for an administrative agency, particularly one as large and complex as the Selective Service System, to require that claims be raised within reasonable time limits or be forfeited.

368 F. 2d at 149.

Even without regard to the propriety of a "forfeiture" or "waiver" theory in this area, the above-quoted portion of *Gearey* is basically irrelevant now in view of the changes in procedures relating to conscientious objection claims to be discussed and the impact of the "reopening" requirements specified in *Mulloy (infra).*

In any event, one "sound reason why a regulation may not require" a "reasonably timely" advancement of claims to statutory deferments or exemptions, is that it may have the effect of depriving registrants entitled to such classifications, of their statutory rights, or, alternatively, that the delay in asserting these claims may have arisen by virtue of the inadequate (or non-existent) affirmative information responsibilities of the System, which leaves many registrants in ignorance of their rights, until the last moment.

cedures applicable to conscientious objector claims in § 6(j) of the Military Selective Service Act of 1967, which eliminates the protracted Department of Justice investigation and hearing, which had often led to delays in excess of two years.[10]

The number of "frivolous" claims that will still be made will hardly result in any additional disruption of the Selective Service System, above and beyond that which the system already tolerates or otherwise allows to exist.[11] And the minor increment in disruption which

---

[10]See House Report No. 267, May 18, 1967, in *U.S. Code Congressional and Administrative News,* 1967, p. 1334.

[11]It can scarcely be overemphasized that the Selective Service System is traditionally used to a large amount of disruption or delay, even with respect to registrants, who have been ordered to induction. Thus the System has developed the practice of ordering an excessive number of registrants to induction to compensate for postponements. See 32 C.F.R. § 1631.7(b). For example, in 1969, New York City Local Boards sent induction notices to nearly 14,000 registrants, to fulfill a need for only 7,700 draftees. See, Ziegler, "Selective Service Meets Massive Resistance," New York Magazine, June 29, 1970, p. 28. This is further illustrated by the fact that over 15% (54,524) of the registrants ordered to induction in 1968 were rejected at the induction center on physical grounds. "*Supplement to Health of the Army: Results of the Examination of Youth for Military Service, 1968.*" Medical Statistics Agency, Department of the Army (1969).

In addition, there is much delay even before registrants ordered to induction, reach the induction center. College students ordered to induction receive either I-S deferments (32 C.F.R. § 1622.15), or informal postponements of induction. State Director Advice No. 763, as amended October 2, 1969, 2 SSLR 29. Doctors and allied specialists may also receive postponements of induction in certain circumstances (*See* Local Board Memorandum 91). Postponements to allow the taking of professional examinations (*e.g.,* bar examinations) may also be obtained (*See* Local Board Memorandum 44). Inductions may be postponed when they fall on religious holidays (see Local Board Memorandum 2; Operations Bulletin 81). Certain registrants intending to enter into active service, or the reserves may also have their inductions postponed until the services make decisions on their applications (*See* Local Board Memorandum 104; Operations Bulletin 287). Finally, inductions may be postponed in ac-

might result if 1625.2 were completely invalidated, can scarcely be urged as making it "necessary" to infringe upon the conscientious objector's unqualified statutory right to exemption, in the manner in which 1625.2 now does so.

Furthermore, it should be noted that this Court has recently rejected the "delay" argument with respect to pre-induction notice requests for reopening. In *Mulloy v. United States,* 398 U.S. 410 (1970) the Court notes:

> The Government argues that if the local board must reopen whenever a prima facie case for reclassification is stated by a registrant, he will be able to postpone his induction indefinitely and the administration of the Selective Service System will be undermined. But the board need not reopen where the claim is plainly incredible, or where even if true, it would not warrant reclassification, or where the claim has already been passed on, or where the claim itself is conclusively refuted by other information in the applicant's file. Moreover, a registrant who makes false statements to his draft board is subject to severe criminal penalties. 50 U.S.C. App. § 462(a).
>
> 398 U.S. at 418.

---

cordance with the order of a federal court, in a civil action for injunctive relief (See Local Board Memorandum 103).

With all these instances of postponements and delay already existing (and accommodated for), the System hardly has standing to argue that it cannot accommodate the relatively infinitessmal number of registrants ordered to induction, who have claims to raise which they are currently restricted from raising because of 1625.2. If allowing would-be lawyers to delay their inductions, or doctors, dentists, etc. to do the same, does not work such intolerable delays upon the system, how can it be maintained that allowing "late" conscientious objector claimants to have similar delays, in order that their claims might be considered, will create intolerable burdens upon the System?

Those same severe criminal penalties would also apply to registrants who furnish false information, for purposes of delay, after the mailing of induction notices. The belief that some misguided delay-seeking registrants are willing to break the law to achieve their purposes, however, should not be considered a valid reason to deprive legitimate late claimants of conscientious objector status of their rights to reopening, reclassification, or administrative appeals. *Cf. Gutknecht v. United States, supra.*

In any event, it is doubtful that regulation 1625.2 will be able to prevent the supposed onslaught of false conscientious objector claims, made only for the purpose of delaying induction. If a registrant is only seeking delay, and is lying about his conscientious objection (and thereby breaking the law in the process) there is no reason to suppose that he could not also fabricate an application for conscientious objection which meets the *Gearey* requirements of late crystallization. In fine, the insincere delay-seekers are still able to achieve their goal, while the only registrants penalized by the "late crytallization" requirement are those sincere applicants, whose claims may not have matured after the issuance of an induction order, but who somehow failed to get their claims in on time, and who are then unable to cover up this lack of late crystallization as cleverly as their less sincere (and perhaps more articulate), delay-seeking fellow registrants.

Indeed, if we are to talk about reasonableness, and burdens on the Selective Service System, it can be argued that *more* of a burden is placed on the system under the *Gearey* late-crystallization rule, than there would be with a total elimination of 1625.2. Under

the *Gearey* rule, not only must the local boards deal with the difficult decision on the merits of the conscientious objection claim, but they must also make a decision on a new, threshold question—*i.e.*, whether the beliefs of the registrant matured or "crystallized" after the mailing of the induction order. *Cf. e.g., Dugiale v. United States,* 389 F. 2d 482 (9th Cir. 1968). This essentially theological question is a very difficult one to answer for lawyers and judges; and yet, typically it is made by the laymen who constitute local boards, who, experience teaches, are opposed to conscientious objectors generally, and who also have quotas to fill and thus are immediately placed in a position adversary to that of the registrant.

The disagreement of registrants with local board decisions on the late crystallization question has already led to much litigation, and the courts themselves have had difficulties formulating proper standards for local board action and judicial review.[12] By striking down

---

[12]These difficulties are typified by the recent case of *Paszel v. Laird,* 426 F. 2d 1169 (2d Cir. 1970). See especially part I of Judge Friendly's opinion, and the cases cited therein. At one point Judge Friendly notes that:

> when the alleged change in status is a recently crystallized conscientious objection, there are but four possible combinations of [local board] findings: (1) conscientious objection both before and after notice of induction: (2) no conscientious objection either before or after; (3) conscientious objection before but not after; and (4) no conscientious objection before but conscientious objection after. Of these only the fourth would permit the board to reopen.

426 F. 2d at 1164.

In disposing of the case, Judge Friendly ultimately ordered that the matter be remanded to the district court for a hearing at which the local board would be called upon to explain the grounds for rejecting Paszel's request for reopening. But *cf. United States v. Cassarino,* 314 F. Supp. 813 at 815. (D.N.H.

(This footnote is continued on the next page)

Regulation 1625.2, the local boards and the courts will not have to deal with this difficult problem of determining the time of maturation of a registrant's belief; they will only have to deal with the merits of each application, whenever made. This will certainly consume less time than is now the case.

Aside from the attempt to find a specific statutory authorization for 1625.2, another theory—that of implicit Congressional approval—has been raised. In *Boyd v. United States,* 269 F. 2d 607 (1959) the Ninth Circuit countered the reliance in *Underwood, supra,* on "the failure of Congress to set forth anywhere that the registrant must claim his exception before notice of induction if he intends not to waive his right to the privilege," with the following:

> We are of the opinion that Congress tacitly approved of those regulations which were in existence at the time that it added the [conscientious objector] exemption from military service. 269 F. 2d at 612.

What the court in *Boyd* meant was that Congress, by periodically re-enacting the Selective Service Act (in substantially the same form), also implicitly approved those regulations which were in existence at the time of the re-enactment. Such a "tacit approval" theory does sound logical and is appealing. However,

---

1970), where the court refused to order a second hearing in similar circumstances).

Can it be maintained that the procedure in Paszel—from local board decision on reopening, to district court, to Court of Appeals, and back to District Court, where the local board members would again be required to testify, is less wasteful of the resources of both the Selective Service System, and the courts, than a procedure eliminating 1625.2's artificial "cut-off" date and requiring all conscientious objector claims to be considered on their merits, without additional hearings on reopening, etc.?

Oestereich, Gutknecht, Breen, and even *Toussie,* make it clear that such a theory is invalid. These cases stand for the proposition that when Congress has explicitly manifested an intent to provide certain substantive rights to draft registrants (such as the right to exemption from combatant training and service in § 6(j) of the Act), there must be an equally explicit Congressional intent to limit those rights before the Supreme Court will allow a limitation regardless of whether a regulation accompanying or authorized "pursuant to" a statutory provision has been extant prior to the re-enactment. An alleged implicit Congressional approval of such a limitation will no longer suffice.

In *Gutknecht* and *Breen,* even though there was an explicit mention of the term "delinquents" in § 6(h)(1) of the Act, this Court refused to imply a Congressional acceptance of the delinquency regulations flowing therefrom. In *Toussie* the Court was faced with the problem of defining the nature of the offense of failing to register—for purposes of computing the time when the statute of limitations began to run. Section 3 of the Act (50 U.S.C. App. § 453) authorizes the President to provide for registration for the draft on specified days. Pursuant to this authorization, Selective Service Regulation 32 C.F.R. § 1611.7(c) sought to establish a continuing duty to register. But despite the seemingly legitimate, and rather specific authorization for the regulation in question, this Court refused to treat the failure to register as a continuing offense as the regulations would make it:

> Since such offenses are not to be implied . . . we think this regulation should not be relied upon . . . unless the statute itself, apart from the regulation justifies that conclusion. 397 U.S. at 121.

Hence we have instances in three of this Court's most recent Selective Service cases, in which this Court has refused to accept the validity or applicability of two different regulations under the "implicit approval" theory; and in those cases, the arguments for an implicit approval of the regulations involved were stronger than the arguments for such an implicit approval of 1625.2; for unlike the regulation imposing delinquency in *Gutknecht*, the "timeliness" requirement of 1625.2 is not even mentioned in the Act. Nor, as with the Regulation providing for promulgation of times to register which thus impose the statutory *duty* to register in *Toussie*, is there any specific authorization for the provisions of 1625.2.[18]

---

[18]For a further illustration of the great reluctance of courts to accept "implied approvals" of regulations limiting statutory rights, in the absence of explicit statutory authorization for such regulations, see *Olsen v. United States*, and *Quaid v. United States*, *supra*. In those cases, the statutory right involved was also the conscientious objector exemption in § 6(j). The regulation limiting the statutory right was 32 C.F.R. § 1631.8, providing for the priority induction of unsatisfactorily-participating reservists, "notwithstanding any other provision of the regulation . . ." This regulation was allegedly authorized in the Act by § 6(c)(2)(D) which states that "the President, under such rules and regulations as he may prescribe, may provide . . ." for the priority induction of reservists who fail to serve satisfactorily, "notwithstanding any other provision of this Act, . . ."

Although § 6(c)(2)(D) gave the President the power to prescribe rules and regulations in a very specific area (unlike § 10(b)(1)), and 32 C.F.R. § 1631.8 seemed to be within that specific area, the courts in *Quaid* and *Olsen* nevertheless found §1631.8 to be invalid because it violated "the *emphatic, imperative* provision of § 456(j) that a conscientious objector shall not be required to serve in the armed forces . . ." *Quaid v. United States*, 386 F. 2d at 29, *cited in Olsen v. United States*, 423 F. 2d at 929, 2 SSLR at 3639. [Emphasis supplied].

In reaching this conclusion, the courts noted the difference in language used in § 6(j) and § 6(c)(2)(D) was "nothing . . . *shall* . . ." whereas the language in § 6(c)(2)(D) was "nothing . . . *may* . . ." Thus § 6(j) was imperative, and took precedence over § 6(c)(2)(D), which was only "discretionary." This same semantic difference again arises in comparing § 6(j)

Previously it was mentioned that the earliest cases dealing with the interaction of 1625.2 with § 6(j) of the Act, were decided in a manner which upheld the superior, statutory rights under § 6(j). In *Clark*, the registrant was being deprived of his right to appeal the denial of conscientious objector classification—a right then conferred in § 6(j) of the 1948 Act. The situatior arose when Clark's local board, acting under the authority of regulations promulgated pursuant to § 10 of the Act, refused to reopen his classification, and then refused to allow him to appeal the refusal to reopen. The court noted the conflict with the Act:

> This section [6(j)] does not indicate any restrictions or limitations on the right of appeal . . . An act of Congress creates that right without any express limitation . . . 105 F. Supp. at 614, 615. *Clark* was followed in *Crawford*.

Together, *Clark* and *Crawford* established a pattern showing the appropriate relationship between parties and regulations: statutes took precedence over conflicting regulations. In *Underwood* this pattern was again followed in a case where 1625.2 was used to bar a post-induction order claim of conscientious objection. The court noted that 1625.2 was clear, but that § 6(j) of the Statute was equally clear—and that the two of them were in conflict. Once again the conflict was resolved in favor of the statutory provision:

> It is plain that a person meeting the conditions of the above section of the Act [§ 6(j)] is not to be subjected to combatant training and service. 151 F. Supp. at 876.

---

with the authorizational capacity of § 10(b)(1), the alleged statutory authority for regulation 1625.2. Section 10(b)(1), just as § 6(c)(2)(D), uses the discretionary word "may". Since § 6(j) is still imperative, it must take precedence over § 10(b)(1), or any regulations promulgated under that section.

These early decisions recognized what the courts in *Olsen* and *Quaid* have more recently labeled as the "emphatic imperative" nature of the provision in § 6(j) that "*nothing*" is to be construed to require conscientious objectors to serve in the armed forces. Unfortunately, the recognition of this principle of statutory supremacy in the *Underwood* cases was ignored, and soon forgotten. But today *Gutknecht, Breen* and *Toussie* have vindicated and revitalized the rationale of the decision in *Underwood et al.*—the insistence of the supremacy of statute over regulations, and of statutorily-created rights over conflicting regulatory provisions, which would eliminate, or otherwise limit the statutory rights. Therefore, courts should follow the *Underwood* cases and deny the validity of the attempt, in regulation 1625.2, to impose upon registrants an additional requirement (timeliness) for classification as a conscientious objector, and at the same time, reject, as will be argued below, the poorly-reasoned cases commencing with *United States v. Schoebel* on another independent ground.

In the ime period during which *Clark, Crawford,* and *Underwood* were being decided, another case, involving a somewhat similar set of circumstances and legal questions was decided to the contrary (without reference to *Clark*, which had been decided several months earlier). In this case—*United States v. Schoebel*, 201 F. 2d 31 (7th Cir. 1953)—the Court of Appeals for the Seventh Circuit upheld the conviction of a registrant who had first attempted to assert a conscientious objection claim after he had received an induction order. The registrant was challenging the refusal of his local board to reopen his classification, but the court held such refusal proper, as being in accord with Regu-

ulation 1625.2. Although the registrant argued that § 6(j) of the Act contained no time limitations, the court rejected this, on a "waiver" theory, holding that:

> Deferment being a privilege, it may be abandoned like any other personal privilege. 201 F. 2d at 32.

Schoebel was deemed to have "abandoned" his "privilege" when he failed to meet the burden of establishing his claim—said burden including a timely filing of the claim. The court did not discuss the statutory authorization, *vel non*, for the regulation, nor its conflict with the Act; rather, its validity and authorization were assumed. And under this assumed legitimacy of the regulation, the court further held that conscientious objection could not be a change in status over which a registrant had no control.[14] In retrospect, we can see the deep significance of *Schoebel*, for it became the progenitor of a line of cases[15] which have upheld the validity of regulation 1625.2 in the face of repeated, and more direct, statutory attacks, and further which have questioned, albeit without explicitly overruling, the *Clark*, *Crawford*, and *Underwood* line of cases. It therefore

---

[14]This holding is contrary to *Gearey*, in accord with *Ehlert*.

[15]*See e.g., Keene v. United States*, 266 F. 2d 378 (10th Cir. 1959), *Boyd v. United States*, 269 F. 2d 607 (9th Cir. 1959), *United States v. Beaver*, 309 F. 2d 273 (4th Cir. 1962), cert. denied, 371 U.S. 951 (1963), *Davis v. United States*, 374 F. 2d 1 (5th Cir. 1967), *United States v. Kroll*, 400 F. 2d 923 (3rd Cir. 1968), cert. denied, 393 U.S. 1069 (1969), *United States v. Gearey*, 368 F. 2d 144 (2nd Cir. 1966), *United States v. Walker*, 424 F. 2d 1069 (1st Cir. 1970). All of these cases ultimately rely on *Schoebel*, and must share its weaknesses.

See also, *United States v. Jennison*, 402 F. 2d 51, SSLR 3211 (9th Cir. 1968), cert. denied, 394 U.S. 912 (1969) rehearing denied, 394 U.S. 955, *United States v. Taylor*, 351 F. 2d 228 (6th Cir. 1965), and *Ehlert, supra*, (9th Cir. 1970). These cases also upheld the validity of regulation 1625.2, but without directly considering the issue of the conflict between the regulation and the statute.

becomes important to examine the validity of *Schoebel* and the cases which followed it, especially in terms of the perspective cast by the recent opinions of the Supreme Court in *Gutknecht, Breen* and *Toussie*.

The post-*Schoebel* decisions have followed its basic "waiver" theory: that a failure to adhere to procedural regulations for the assertion of the "privilege" of exemption as a conscientious objector, can result in a waiver or abandonment of that "privilege." *Gutknecht* makes it clear that such a waiver theory is invalid. Selective Service Regulations may not be used, in disregard of the structure of the Selective Service Act, to deprive registrants of their statutory entitlements.[16] This Court in *Gutknecht,* cites with approval the following from *United States v. Eisdorfer,* 299 F. Supp. 975, 989 (E.D. N.Y. 1968).

> The delinquency regulations, moreover, disregard the structure of the Act; deferments and priorities-of-induction, adopted in the public interest, are treated as if they were forfeitable personal privileges. 396 U.S. at 303.

Schoebel and its progency do exactly what *Gutknecht* and *Eisdorfer* say they may *not* do: they allow 1625.2 to operate in complete disregard of the structure of the Selective Service Act, and they treat an absolute, unconditional statutory exemption as a forfeitable personal privilege.

---

[16]This term "entitlements" would embrace exemptions, deferments, and induction priority positions. See *Oestereich, Breen* and *Gutknecht, supra,* involving respectively, an "exemption," a "deferment," and an "inductrion priority position." For this latter entitlement, 32 C.F.R. § 1631.7 sets out order-of-call priorities which this Court implicity accepted, as effecuating the statutory scheme, in striking down the delinquency regulations (32 C.F.R. pt. 1642) in *Gutknecht.*

Even without *Gutknecht,* the validity of a waiver theory in this area would be highly questionable.

Conscientious objector claimants in the Armed Forces, on the other hand, may have their claims considered from within the service, under AR 635-20 (if they become conscientious objectors while in the service), even though it is long past the time when they were mailed an induction order.

The above situation is far too haphazard a way to deal with young men who assert a right to serve their country consistently with their consciences and religious beliefs—beliefs traditionally afforded a high degree of protection in our society, and rooted in the earliest history of this country. A system which allows this on the basis of the tenuous claim that such treatment is "necessary" for purposes of "national defense," is at the least, not "fair and just," and the price to be paid is far too great, in a democratic, free society. As this Court noted in *United States v. Robel:*

> The concept of 'national defense' cannot be deemed an end in itself, justifying any exercise of legislative power designed to promote such a goal. Implicit in the term 'national defense' is the notion of defending those values and ideals which set this Nation apart. 389 U.S. 258, 264 (1967).

Generally, a waiver theory is only applicable when there is knowledge and full disclosure, and when great unfairness will not be worked upon its imposition.[17]

---

[17] *Cf.,* the following from *United States v. Freeman,* 388 F. 2d 246, at 250 (7th Cir. 1967):

> ". . . the awesome responsibility carried by Local Boards in 'balancing between the demands of an effective system of mobilizing the nation's manpower in times of crisis and

(This footnote is continued on the next page)

Full disclosure is usually the exception rather than the rule in the Selective Service area;[18] and with its massive complexities and confusions, imposition of the waiver doctrine here is not apt.[19] These complexities make it

---

the demands of fairness toward the individual registrant' cannot justify denial of basic fairness. *Simmons v. United States,* 348 U.S. 397, 403, . . ."

See also the dissent in the en banc decision in *Lockhart v. United States,* 420 F. 2d 1145, 2 SSLR 3436 (9th Cir. 1970), discussing "waiver" in a situation where a registrant failed fully to exhaust administrative remedies:

"the test to be applied is that of waiver—'an intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). The registrant may be denied judicial review of his classification only if he understandingly and knowingly forewent the privilege of seeking to vindicate his claim before the state board."

[18]*See e.g., United States v. Hosmer,* Crim. No. 70-21, (D. Me., March 31, 1970) (Gignoux, J.), slip opinion at 10:

It is settled in this Circuit, as elsewhere, that the Selective Service System is under no affirmative obligation to provide a registrant with 'free advice and assistance either in preparing questionnaires and forms for submission to his local draft board or with respect to other matters relating to his liabilities under the selective service law.' The only affirmative duty of a Selective Service official is not to mislead, and to give clear and correct information and advice when requested to do so. (Citations omitted).

See also, Comment, *The Selective Service System: An Administrative Obstacle Course,* 54 Calif. L. Rev. 2123 (1966).

[19]See note 17, *supra.* See SSLR Practical Manual, ¶ 1048.1, note 10:

A presumption that an important right is lost by failure to assert it seems particularly unfortunate in this field. The right to take an appeal in a criminal case, which if not asserted seasonably is usually held irredeemably lost, has been held not to have been voluntarily waived by one who was not shown to have made a considered choice to forego it. *Fay v. Noia.* The Supreme Court has emphasized time and again that a constitutional right may not be foregone without a deliberate choice—an intentional relinquishment of a known right. Of course, the conscientious objector exemption is statutory in the first instance, although the free exercise clause may compel Congress to recognize it. [citations omitted].

(To the argument that some may make that SSS Form 100 (the initial Classification Questionnaire) provides the would-be conscientious objector with knowledge of the availability of

virtually impossible for the lawyer, need alone the layman, to acquire the full knowledge that would be required for an intelligent, knowing waiver.[20]

The waiver theory might also have been based on the once-respected doctrine which set up a dichotomy of "rights" and "privileges." "Rights," on the one hand could not be waived; but "privileges," on the other hand, being mere matters of legislative grace, and subject to the whims of the authority governing their dispensation, could be waived—could be far more severely conditioned or restricted than "rights."

But the waiver theory, on this ground, too, has been resoundingly repudiated during this past decade for the access to governmental benefits, even those customarily (though perhaps mistakenly) denominated "privileges," may not be denied by a method or under a standard which the Bill of Rights interdicts.

Statutorily-conferred Selective Service classifications are entitled to such protections; to hold otherwise violates due process of law. The denial of access to conscientious objector status, imposed upon registrants by the refusal of draft boards to reopen classifications, based on findings of the absence of "circumstances beyond the registrant's control," as required by regulation

---

such status, the reader is directed to study the form with care, and to note that the space provided for the assertion of the claim is totally lacking in any explanation as to the availability or meaning of conscientious objector status; rather the form merely promises to send another form if the registrant signs the terse, and "strictly religious" statement in Series VIII of the form).

[20] *See Sherbert v. Verner,* 374 U.S. 398 (1963); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law,* 81 Harv. L. Rev. 1439 (1968); Linde, *Justice Douglas on Freedom in the Welfare State: Constitutional Rights in the Public Sector,* 39 Wash. L. Rev. 4 (1964), 40 Wash. L. Rev. 10 (1965); O'Neil, *Unconstitutional Conditions: Welfare Benefits with Strings Attached,* 54 Calif. L. Rev. 443 (1966).

1625.2, is fundamentally deficient in those basics of procedural fairness which are constitutionally required.

In sum, the waiver theory may not be applied here because (1) it is not applicable without a showing of knowledge, disclosure, and fairness; (2) *Gutknecht* vitiates the "privilege theory" of classification which underpins the *Schoebel* waiver theory; (3) access to the "right" or "privilege" (exemption from combatant service as a conscientious objector) is severely restricted by procedures which themselves are violative of the due process clause.

Section 1(c) of the Military Selective Service Act of 1967 provides that:

> The Congress further declares that in a *free society* the obligation and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is *fair and just* . . . (Emphasis supplied).

Notwithstanding the above requirement of "fairness" and "justice" regulation 1625.2 effectively denies, for a large number of conscientious young men, their right *ever* to assert a successful claim for the time-honored classification of conscientious objector—a right absolutely guaranteed within the statutory scheme of the Selective Service Act.

The true conscientious objector's only recourse is to refuse induction, and, if courts continue to uphold the validity of regulation 1625.2, to be sentenced to prison —thus creating a system not to provide men for the military, but for the federal penitentiaries.

The present situation with respect to late conscientious objector claims is rife with anomalies. Depending upon the location of a registrant's board, or perhaps his trial[21] (*i.e.*, whether it is within an *"Ehlert"* or *"Gearey"* jurisdiction), he may or may not be allowed to have his late claim considered.

Conclusion.

In view of the above reasons, Petitioner respectfully requests that this Honorable Court issue a Writ of Certioriari to the Court of Appeals of the Ninth Circuit to review its decision in this case.

WILLIAM G. SMITH,
MICHAEL E. SOMERS,
DANIEL KALLEN,
DON ROSS BAY,
Attorneys for Petitioner.

---

[21]In *United States v. LaForge*, No. CR 70-153 (N.D. Calif. 1970) the registrant's local board was located in Connecticut (a *Gearey* jurisdiction) but the registrant refused induction in California (an *Ehlert* jurisdiction) thus creating a unique conflict of laws problem to be contended with at trial: by which Circuit's standard was the conduct of LaForge's board to be governed? *See* Defendant's Trial Memorandum at 16-24. The court was able to avoid the problem by transferring the case to Connecticut under Rule 21 (b) of the Federal Rules of Criminal Procedure, as strongly urged by defendant's counsel. Dismissal has been recommended by the United States Attorney in Connecticut.

APPENDIX.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

United States of America, Appellee, vs. Paul "J" Nix, Appellant. No. 25,871.

[February 3, 1971]

Appeal from the United States District Court for the Central District of California

Before: BARNES and DUNIWAY, Circuit Judges, and SOLOMON*, District Judge.

PER CURIAM:

Paul Nix was convicted in a court trial for his refusal to be inducted into the armed forces in violation of 50 U.S.C. App. § 462. In this appeal he contends that his local board denied him due process (1) by refusing to reopen his classification when he requested a Conscientious Objector's classification after he received a notice of induction and (2) by constructively reopening his classification without allowing a Selective Service appeal.

Nix was reclassified 1-A on February 5, 1968. During the summer of 1968 he became interested in the Jehovah's Witnesses. Nevertheless, on July 18, 1968, he enlisted and was inducted into the Naval Reserves to report for duty on November 14, 1968. On that day he reported, but was discharged for the convenience of the government, apparently because he admitted in a questionnaire that he had experimented with marijuana.

---

*Honorable Gus J. Solomon, United States District Judge, District of Oregon, sitting by designation.

On February 28, 1969, the local board mailed Nix an order to report for induction on March 25, 1969. Shortly before that day, Nix requested and received Conscientious Objector Form 150, which he completed and returned to the local board on March 24, 1969.

The board postponed Nix's induction and scheduled an interview for April 4, 1969. Before the board interviewed Nix, he signed a statement that he understood that the interview was neither a personal appearance nor a reopening of his classification. During the interview Nix stated that he had been against war since he was a child; that he became a Jehovah's Witness during the summer of 1968; and that he became a conscientious objector shortly after he began studying the Bible.

On April 8, 1969, the board notified Nix that it had not reopened his classification because it found that there was no change in his status resulting from circumstances beyond his control.

On June 30, 1969, Nix refused to submit to induction. He was later inducted and convicted.

Nix contends that the board's refusal to reopen his classification in response to his Form 150 denied him due process. He argues that this Court's recent *en banc* decision in *Ehlert v. United States*, 422 F.2d 332 (9th Cir. 1970), *cert. granted* 397 U.S. 1074 (1970), should be reversed.

In *Ehlert* this Court held that the crystallization of conscientious objection between the time a notice of induction is mailed and the time induction is scheduled, is not a change in status resulting from circumstances beyond the registrant's control within the meaning of 32 C.F.R. § 1625.2.

This is not a case of a late crystallization of belief after the receipt of notice to report for induction. Rather, it is a case of the late filing of a previously matured conscientious objector's belief. Therefore, the board was not permitted to reopen Nix's classification. *United States v. Uhl,* .... F.2 .... (9th Cir., Dec. 23, 1970); *Dugdale v. United States,* 389 F.2d 482 (9th Cir. 1968).

Nix's next contention, that the board constructively reopened his classification, is dependent upon our finding that the board could have properly reopened his classification. Since we find that the board had no such authority, we must reject this contention even if Nix had not signed a waiver.

Nix also contends that the local board was not properly constituted since not all of its members resided within the local board's jurisdiction. The same contention was considered and rejected in *Czepil v. Hershey,* 425 F.2d 251 (7th Cir. 1970), *cert. denied,* .... U.S. .... (Oct. 13, 1970); *United States v. Reeb,* .... F.2d .... (9th Cir., Oct. 27, 1970).

Nix's last contention that he did not have the requisite intent to be guilty of a Selective Service Act violation is wholly without merit. *Harris v. United States,* 412 F.2d 384 (9th Cir. 1969).

The judgment of conviction is affirmed.